

June 14 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**Supreme Court Cause No. \_\_\_\_\_**

Robert K. Baldwin  
Trent M. Gardner  
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Attorneys for Plaintiff/Appellant West Jordan, LLC  
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**CHARLES W. HINESLEY,**

**Plaintiff/Counterdefendant/Appellee,**

**v.**

**WEST JORDAN, LLC,**

**Defendant/Counterclaimant/  
Appellant,**

**NOTICE OF APPEAL**

**v.**

**HINESLEY FAMILY LIMITED  
PARTNERSHIP NO. 1,**

**Counterdefendant/Appellee,**

**v.**

**CITY OF BOZEMAN, MONTANA,**

**Third Party Defendant.**


NOTICE is given that WEST JORDAN, LLC, the Appellant above-named and who is the Defendant in that cause of action filed in the Eighteenth Judicial District, in and for the County of Gallatin, as Cause No. DV-05-312, hereby appeals to the Supreme Court of the State of Montana from the Decision and Order on West Jordan's Motion for Partial Summary Judgment Enforcing Settlement entered in such action on the 16th day of December, 2009.

**THE APPELLANT FURTHER CERTIFIES:**

1. That this appeal is not subject to the mediation process required by M.R.App.P.7.
2. That this appeal is an appeal from an order certified as final under M.R.Civ.P. 54(b). A true copy of the District Court's certification order is attached hereto as Exhibit "A."
3. That no Rule 27 notice has been provided because there is no challenge being made to the constitutionality of any act of the Montana Legislature.
4. That all available transcripts of the proceedings in this cause have been ordered from the court reporter contemporaneously with the filing of this notice of appeal. If all available transcripts have not been ordered, that Appellant has complied with the provisions of M.R. App.P.8(3) contemporaneously with the filing of this notice of appeal.
5. That included herewith is the filing fee prescribed by statute.

DATED this 11th day of June, 2010.

GOETZ, GALLIK & BALDWIN, P.C.

By:   
Robert K. Baldwin/Trent M. Gardner  
Attorneys for Defendant/Appellant  
West Jordan, LLC

## CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above referenced District Court action, as follows:

- ☒ U.S. Mail
- ☐ Federal Express
- ☐ Hand-Delivery
- ☐ Via fax:

Jennifer Brandon  
Clerk of District Court  
Gallatin County  
615 South 16<sup>th</sup>, Room 302  
Bozeman, MT 59715-4107


- ☒ U.S. Mail
- ☐ Federal Express
- ☐ Hand-Delivery
- ☐ Via fax:

Robert L. Sterup  
Holland & Hart, LLP  
1500 First Interstate Center  
401 North 31<sup>st</sup> Street  
P.O. Box 639  
Billings, MT 59103-0639

- ☒ U.S. Mail
- ☐ Federal Express
- ☐ Hand-Delivery
- ☐ Via fax:

J. Robert Planalp  
Landoe, Brown, Planalp & Reida, P.C.  
P.O. Box 1  
Bozeman, MT 59771-0001

DATED this 11th day of June, 2010.



Robert K. Baldwin/Trent M. Gardner  
Goetz, Gallik & Baldwin, P.C.  
P.O. Box 6580  
Bozeman, MT 59771-6580  
Attorneys for Defendant/Appellant

DA 10-0304

GALLATIN COUNTY CLERK  
OF DISTRICT COURT  
JENNIFER RANDSON

2010 MAY 17 10 4 17

FILED

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

\* \* \* \* \*

CHARLES W. HINESLEY,

Plaintiff and Counter-  
Defendant,

vs.

WEST JORDAN, LLC,

Defendant and Counter-  
Claimant,

vs.

HINESLEY FAMILY LIMITED  
PARTNERSHIP NO. 1,

Counter-Defendant,  
Counter-Plaintiff, and  
Third Party Plaintiff,

vs.

CITY OF BOZEMAN, MONTANA,

Third Party Defendant.

Cause No. DV-05-312

**RULE 54(b), M.R.Civ.P.  
CERTIFICATION**

**FILED**

JUN 14 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

On March 12, 2010, Plaintiff and Counter-Defendant Charles W. Hinesley ("Hinesley") and Counter-Defendant, Counter-Plaintiff, and Third Party Plaintiff Hinesley Family Limited Partnership No. 1 ("HFLP") filed Plaintiff's Proposed Amended Scheduling Order. In Plaintiff's Proposed Amended Scheduling Order, Hinesley and HFLP request the Court to certify its

EXHIBIT

A

December 17, 2009 Decision and Order for immediate appeal pursuant to Rule 54(b), M.R.Civ.P. On March 31, 2010, Defendant and Counter-Claimant West Jordan, LLC ("West Jordan") filed West Jordan's Reply Brief Re: Rule 54(b) Certification. On April 1, 2010, Third-Party Defendant City of Bozeman, Montana ("City of Bozeman") filed City of Bozeman's Brief Regarding Rule 54(b) Certification. On April 16, 2010, Hinesley and HFLP filed Plaintiff's Reply Brief Re: Rule 54(b) Certification. From reviewing the briefs and filings of counsel, the Court is fully advised.

### **BACKGROUND**

The following facts are not in dispute. Hinesley and HFLP are the developers of the Laurel Glen Subdivision in Bozeman, Montana ("Laurel Glen"). By an Agreement for Sale of Real Property dated January 17, 2003 ("2003 Agreement"), Hinesley contracted to sell certain lots in Phase III of Laurel Glen to West Jordan. According to Hinesley and HFLP, the 2003 Agreement provided that it would be automatically terminated if final plat approval for Phase III of Laurel Glen had not been granted by the City of Bozeman on or before November 30, 2005. Final plat approval for Phase III of Laurel Glen was not granted by the City of Bozeman on or before November 30, 2005. As a result, Hinesley filed a complaint against West Jordan seeking a declaration that his obligations under the 2003 Agreement had been terminated. West Jordan filed a counterclaim against Hinesley and HFLP alleging that Hinesley did not exercise "due diligence" in his efforts to obtain final plat approval from the City of Bozeman.

In August of 2007, Hinesley, HFLP, and West Jordan entered a Settlement Agreement ("Settlement Agreement") that amicably resolved their respective claims. Ultimately, however, the terms of the Settlement Agreement were not fulfilled as pledged. As a result, on July 18, 2008, West Jordan filed an amended counterclaim against Hinesley and HFLP seeking specific

performance of the Settlement Agreement, attorney fees and costs, and compensatory damages. On December 17, 2009, the Court issued a Decision and Order declaring the Settlement Agreement to be invalid. Presently at issue is whether the Court's December 17, 2009 Decision and Order should be certified for immediate appeal pursuant to Rule 54(b), M.R.Civ.P.

### **DISCUSSION**

The parties agree that the Court's December 17, 2009 Decision and Order should be certified for immediate appeal pursuant to Rule 54(b), M.R.Civ.P. However, despite the parties' agreement, this Court must analyze whether such a certification is appropriate. See Rule 4(4)(b), M.R.App.P.; *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 16, 317 Mont. 413, 77 P.3d 531. The following factors are relevant to this analysis:

1. The relationship between the adjudicated and unadjudicated claims;
2. The possibility that the need for review might or might not be mooted by future developments in district court;
3. The possibility that the reviewing court might be obliged to consider the same issue a second time;
4. The presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; and
5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

*Roy v. Neibauer*, 188 Mont. 81, 87, 610 P.2d 1185, 1189 (1980). The Court will analyze each of these factors in turn.

**1. The relationship between the adjudicated and unadjudicated claims**

The "adjudicated" and "unadjudicated" claims at issue are separate and distinct from one another. The "adjudicated claims" arise from the Settlement Agreement. The "unadjudicated

claims” arise from the 2003 Agreement. Accordingly, this factor supports Rule 54(b), M.R.Civ.P. certification.

**2. The possibility that the need for review might or might not be mooted by future developments in district court**

West Jordan asserts that if it “obtain[s] a satisfactory judgment [on the ‘unadjudicated claims’], it likely [will] not . . . complain about the [December 17, 2009 Decision and Order].” Therefore, there is a possibility that future developments in district court will moot the need for review of the December 17, 2009 Decision and Order. Accordingly, this factor does not support Rule 54(b), M.R.Civ.P. certification.

**3. The possibility that the reviewing court might be obliged to consider the same issue a second time**

The operative facts surrounding the “adjudicated claims” are separate and distinct from the operative facts surrounding the “unadjudicated claims.” Therefore, an immediate appeal of the “adjudicated claims” will not cause the Montana Supreme Court to consider the same issues a second time if a decision on the “unadjudicated claims” is also appealed. Accordingly, this factor supports Rule 54(b), M.R.Civ.P. certification.

**4. The presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final**

This factor is inapplicable since the December 17, 2009 Decision and Order does not contain a monetary judgment.

**5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like**

If, on appeal, the Montana Supreme Court finds the Settlement Agreement to be valid, the “unadjudicated claims” arising from the 2003 Agreement will be moot. Therefore, allowing an immediate appeal could potentially save the parties and this Court the time and expense

necessary to adjudicate the claims arising from the 2003 Agreement. Accordingly, this factor supports Rule 54(b), M.R.Civ.P. certification.

### CONCLUSION

In accordance with the foregoing analysis, the Court finds that its December 17, 2009 Decision and Order should be certified for immediate appeal pursuant to Rule 54(b), M.R.Civ.P.

#### IT IS HEREBY ORDERED:

1. This Court's December 17, 2009 Decision and Order shall be certified for immediate appeal pursuant to Rule 54(b), M.R.Civ.P.

2. All proceedings in this Court shall be **STAYED** pending appeal of the December 17, 2009 Decision and Order.

Dated this 17th day of May, 2010.

  
Hon. Mike Salvagni  
District Judge

c: ✓Robert L. Sterup  
✓Robert K. Baldwin/Trent M. Gardner ✓  
✓J. Robert Planalp

*at  
cham  
5-18*




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DATED this 11th day of June, 2010.

GOETZ, GALLIK & BALDWIN, P.C.

By:   
Robert K. Baldwin/Trent M. Gardner  
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DA 10-0304

GALLATIN COUNTY CLERK  
OF DISTRICT COURT  
JENNIFER RANDON

2010 MAY 17 10 4 17

FILED

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Third Party Defendant.

Cause No. DV-05-312

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Dated this 17th day of May, 2010.

  
Hon. Mike Salvagni  
District Judge

c: ✓Robert L. Sterup  
✓Robert K. Baldwin/Trent M. Gardner ✓  
✓J. Robert Planalp

*cc: [unclear] 5/18*